IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.	)	
	)	
Plaintiff	)	
	)	
v.	)	Case No. 4:05-cv-00329-JOE-SAJ
	)	
TYSON FOODS, INC., et al	)	
	)	
Defendants.	)	
_____	)	

REPLY MEMORANDUM OF TYSON FOODS, INC. IN SUPPORT OF ITS MOTION TO DISMISS COUNTS 4-10 OF THE FIRST AMENDED COMPLAINT

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Oklahoma asserts that counts 4-10 of the First Amended Complaint ("Complaint") should not be dismissed because: (1) Congress has left the subject of nonpoint source pollution largely unregulated and thereby has left the field open for claims brought under state law and federal common law; and (2) Oklahoma's admitted attempt to replace Arkansas law with Oklahoma law in regulating conduct occurring within Arkansas does not violate the Commerce Clause or Arkansas's sovereign right to govern conduct within its own borders. Each of these arguments is incorrect and must be rejected.

I. THE CLEAN WATER ACT'S TREATMENT OF NONPOINT SOURCES PREEMPTS OKLAHOMA'S STATE LAW CLAIMS

Oklahoma admits that its Complaint targets both point sources and nonpoint sources of pollution as defined in the Clean Water Act ("CWA") and its accompanying regulations. *See* Plaintiff's Response in Opposition to 'Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 Of The First Amended Complaint' at 5-6 ("Resp."). However, while Oklahoma does not contest the fact that the CWA preempts state-law suits against out-of-state point sources, Oklahoma asserts that its state law claims against out-of-state nonpoint sources are actionable. *Id.* at 12-13. This argument must fail because, as the Supreme Court has held, the CWA "dominate[s] the field of [interstate water] pollution regulation," *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987), which now includes both point and nonpoint source regulations. In fact, the federal courts have recognized that the point and nonpoint source provisions of the CWA and its implementing regulations are interwoven and create a comprehensive system of regulations to reduce pollution. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1133 (9th Cir. 2001) (33 U.S.C. § 1329 "is one of numerous interwoven components that together make up an intricate statutory scheme addressing technically complex environmental issues"). Contrary to Oklahoma's assertions, this complex scheme of interwoven provisions and regulations leaves no room for

states to regulate the field of nonpoint water pollution through litigation under unrelated state laws. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) ("If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted.")

A. Nonpoint Source Regulation Is Interwoven With Point Source Regulation Such That Together These Programs Preempt State Law Claims

In order to avoid the preemptive effects of the CWA, Oklahoma proffers an artificially narrow construction of the preempted field. While nonpoint source regulation is comprehensive standing alone, it should not be viewed in isolation, as Oklahoma urges. Resp. at 14-18. Nonpoint source provisions, including water quality standards and TMDLs,[1] regulate the total amount of pollutants in an impaired waterbody. 33 U.S.C. §§ 1313(d), 1319(a), 1319(b). Whether those pollutants arrived via point sources or nonpoint sources is immaterial. Nonpoint source pollutants require amendments to point source permits, if possible, to reduce the net amount of pollutants in an impaired waterbody and come into attainment under the CWA.

> Each TMDL serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies, allocating the total 'load' - the amount of pollutant introduced into the water, *see* 40 C.F.R. § 130.2(e) - specified in that TMDL among contributing point and non-point sources. The theory is that individual-discharge permits will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL. As should be apparent, TMDLs are central to the Clean Water Act's water-quality scheme because . . . they 'tie together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water'.

Sierra Club v. Meiburg, 296 F.3d at 1026 (quotation omitted). *See also Pronsolino*, 291 F.3d at 1133. Under *Ouellette*, Oklahoma's state law claims are preempted where they "would be a serious interference with the achievement of the full purposes and objectives of Congress." 479

[1] A total maximum daily load ("TMDL") calculates how much of a specific pollutant a specific waterbody can receive each day without exceeding water quality standards. 33 U.S.C. §§ 1313(d)(1)(C); 40 C.F.R. § 130.7.

U.S. at 493 (quotation omitted). The Eleventh Circuit's explanation of the inseparability of point source regulation and nonpoint source regulation illustrates the need for this Court to decline Oklahoma's invitation to pry them apart and allow State law actions to eclipse federally supervised nonpoint source management programs. Without the nonpoint source program, the CWA's comprehensive approach to water quality could not be achieved. And of course, this added layer of nonpoint source complexity on top of point source regulation only reinforces the Supreme Court's holding that the CWA is "an all-encompassing program of water pollution regulation" that "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." City of *Milwaukee v. Ill. and Mich.*, 451 U.S. 304, 317-318 ("Milwaukee II).

B. The CWA Requires Establishment of Nonpoint Source Regulations

Moreover, Oklahoma is mistaken when it argues that Congress has not imposed any regulatory regime on nonpoint source pollution, leaving states free to impose their statutes and common law on out-of-state sources. Resp. at 14-18. This argument ignores CWA provisions *directly* addressing nonpoint source pollution—which unambiguously demonstrate that Oklahoma's claims fall in the preempted field—and mischaracterizes Tenth Circuit precedent.[2]

1. The CWA's Nonpoint Source Program Is Not Voluntary But May Be Operated By States In Lieu of EPA

In the CWA Congress enacted a comprehensive scheme that provides states with the choice whether to implement point and nonpoint regulations or to fall back on federal regulation. States are given the opportunity to implement regulations governing both point and nonpoint sources of pollution within their boundaries. *See* 33 U.S.C. § 1342(b) (discussing each state's

[2] Oklahoma cites *American Wildlands v. Browner*, 260 F.3d 1192 (10th Cir. 2001), and *Defenders of Wildlife*, 415 F.3d 1121, but neither case addressed preemption.

option to administer the point source permitting scheme); *id.* at § 1319(d)(3) (discussing EPA's obligation to fulfill noncompliant state's duties under nonpoint source scheme). However, in the areas of both point and nonpoint source regulation, the EPA will implement both programs if a state fails to regulate consistent with the CWA. *See Defenders of Wildlife*, 415 F.3d at 1124 ("Should a state fail to make the required changes, *the EPA must* enact replacement standards that are consistent with the CWA *and impose them upon the State*.") (emphases added) (citing 33 U.S.C. § 1313(c)(3)-(4)(A)).[3]

Oklahoma simply miscasts the preemption question by focusing on the fact that, under the CWA, states have a "voluntary" choice to develop nonpoint source pollution regulations or have those provisions imposed by the EPA. *See* Resp. at 12, 16. This optional delegation of authority is irrelevant to the preemption analysis. In our federalist system of government, all federal mandates (including those imposed by the CWA) are undertaken voluntarily by states or are imposed directly on the regulated parties by federal law. *See, e.g., Printz v. United States*, 521 U.S. 898, 925 (1997) ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs"); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may not compel state legislatures to enact state laws but may regulate the states and private parties directly); *South Dakota v. Dole* 483 U.S. 203 (1987). The EPA is just as powerless to coerce states to regulate point sources as nonpoint sources, yet

[3] Oklahoma relies on the floor statement by Senator Mitchell that "no State is compelled to adopt a program to control nonpoint source pollution." (Resp. at 15) (quoting 133 Cong. Rec. 1568, 1571 (Jan. 21, 1987)). This proposition is irrelevant to the preemption analysis for the reasons stated above and *infra*. No state is compelled to adopt a nonpoint source program, but if a state does not adopt the program the EPA will. The plain language of section 1329, requiring a nonpoint source management program, contradicts any inference that nonpoint sources go unregulated. In this light, Senator Mitchell's comment is in harmony with other floor statements asserting that federal and state common law actions are preempted by "*EPA-approved water pollution control requirements*." Resp. at 15 n.10 (citing 133 Cong. Rec. 983, 986-987 (Jan. 8, 1987) (emphasis added in Oklahoma's Response)).

Oklahoma readily concedes that the CWA preempts common law suits against point sources. *See* Resp. at 12-13. Because the voluntary nature of state participation is irrelevant to the preemption analysis, the Supreme Court did not even discuss the subject in *Ouellette*, 479 U.S. 481, where it held the CWA's point source provisions to preempt common law claims.

In any event, Oklahoma's argument about the "choice" Congress has presented to states in enacting nonpoint source regulations is hollow because both Oklahoma and Arkansas *have* elected to participate in the CWA's nonpoint source scheme, thereby ensuring that nonpoint source regulations are within the occupied field for purposes of a preemption analysis. *See, e.g.*, 69 Fed. Reg. 63,079 (Oct. 29, 2004) (approving revisions to Arkansas's water quality standards); 66 Fed. Reg. 29,951 (June 4, 2001) (EPA approval of revisions to Oklahoma's water quality standards). Even if Oklahoma somehow had the choice to decline the program and thus prevent the CWA from occupying the field of nonpoint source regulation, Oklahoma accepted Congress's invitation and cannot now argue to the contrary.

Accordingly, the distinction that Oklahoma attempts to draw between point and nonpoint source regulation under the CWA is inconsequential to a preemption analysis. Regardless of whether individual states accept the invitation to regulate point and/or nonpoint sources in a manner consistent with the CWA or choose to have those regulations imposed by the EPA, the fact remains that Congress established a comprehensive regulatory scheme that *requires* addressing point and nonpoint source pollution, either by the states or else the EPA. *See* 33 U.S.C. §§ 1313(a)(2), (b)(1), (b)(2) (EPA will promulgate water quality standards); 1313(d)(2) (EPA will identify impaired waters and promulgate TMDLs); 1329(a)(1)(C), (d)(3) (EPA will promulgate State water assessment report, identify significant nonpoint sources of pollution, identify "best management practices and measures to control each category and subcategory of

nonpoint sources," and create nonpoint source management program). In fact, even if a state elects to promulgate nonpoint source regulations under the CWA, the EPA must *approve* those regulations before they can be published as state law. *See*, 33 U.S.C. §§ 303(b)(2), 319(d); 66 Fed. Reg. 29,951 (June 4, 2001) (EPA approval of revised Okla. Admin. Code § 785:45); Okla. Admin. Code § 785:45-5-13 (regulation of nonpoint source pollution from livestock and irrigation); *id.* § 785:45-5-25 (regulation of "Non-Point Source Discharges or Runoff"). Thus, all nonpoint source regulations are implemented under the CWA's authority and the EPA's oversight. *See Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) ("[S]tate water quality standards - promulgated by the States with substantial guidance from the EPA and approved by the Agency - are part of the federal law of water pollution control … treating state standards in interstate controversies as federal law accords with the Act's purpose of authorizing the EPA to create and manage a uniform system of interstate water pollution regulation") (footnote omitted).

2. A Permitting Program Is Not Needed To Find Preemption

Instead of addressing the scope of federal nonpoint source regulation under the CWA, Oklahoma attempts to distinguish nonpoint source regulation by focusing on the absence of a permitting program for nonpoint sources. *See* Resp. at 16-17. But preemption is not invoked only for those federal laws with some type of permitting process. Rather, the standard for preemption is whether the CWA is "sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation," *Ouellette*, 479 U.S. at 491 (quotations omitted), or whether State law claims "would be a serious interference with the achievement of the full purposes and objectives of Congress." *Id.* at 493 (quotation omitted). Thus, where Congress has chosen to preempt the field, "any state law falling within that field is preempted," *Silkwood.* 464 U.S. at 248, without regard to the existence or nonexistence of federal regulation.

Here, Oklahoma ignores the nature of nonpoint source pollution and Congress's regulatory response. Congress's scheme of nonpoint source regulation is intended to address pollution that comes from broad or undefined sources—situations where there is no single point source of pollution to permit or punish. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) ("Non-point sources cannot be regulated by permits because there is no way to trace the pollution to a particular point, measure it, and then set an acceptable level for that point. Therefore, to regulate non-point pollution, the Act requires states to establish water quality standards."). Congress has intentionally chosen differing treatment of nonpoint sources and point sources due to their differing natures. *Cf. Milwaukee II* 451 U.S. at 323 ("The difference in treatment between overflows and treated effluent by the agencies is due to differences in the *nature* of the problems, *not* the extent to which the problems have been addressed.").

Given the extensive obligations Congress has imposed, the technical nature of assessing and designating water quality standards, and the autonomy afforded each state by Congress in creating solutions to the varied causes of nonpoint source pollution, it is clear the CWA's nonpoint source provisions are, under the Supreme Court's *Ouellette* analysis, "sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." *Ouellette*, 479 U.S. at 491 (quotations omitted). In fact, it would be bizarre for Congress to append nonpoint source regulations onto the all-encompassing CWA with the unspoken intention of allowing state law claims to pick away at the Act's complex structure.[4]

In all events, *even if* the Court were to conclude that nonpoint source pollution regulation is not within the preempted field, conflict preemption would still require Oklahoma's action to

[4] The CWA specifically preserves a source State's right to impose higher standards, including common law standards, upon its own sources. 33 U.S.C. § 1370. As the Supreme Court has twice noted, allowing State law claims by the affected State would undermine the CWA's regulatory structure. *Ouellette*, 479 U.S. at 497; *Milwaukee II*, 451 U.S. at 328.

be dismissed, *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) ("[S]tate law is pre-empted to the extent that it actually conflicts with federal law.") When nonpoint source pollution from another state contributes to water quality impairment, the CWA requires the EPA to convene a "management conference of all States which contribute significant pollution resulting from nonpoint sources" to that water body. 33 U.S.C. § 1329(g)(1). There, the EPA will "develop an agreement among such States to reduce the level of pollution in such portion resulting from nonpoint sources . . . ." *Id.* Each state's nonpoint source management program will be revised to reflect its commitments within the agreement. *Id.* § 1319(g)(2). Allowing Oklahoma to simply sue its way past the CWA's nonpoint source mediation program undeniably conflicts with Congress's design to keep common law suits out of interstate nonpoint source water pollution disputes. Accordingly, the CWA preempts nonpoint source based claims.

3. Oklahoma's Characterization of Nonpoint Source Provisions As A Grant Program Is Misleading and Legally Irrelevant

Oklahoma incorrectly claims that the nonpoint source provisions of the CWA require states to only file a few reports in exchange for grants. Resp. at 12. States expend considerable resources to comply with 33 U.S.C. §§ 1313 and 1329, and Congress established a grant program to partially offset the cost of these activities. It is the grants that are optional under the CWA, however, not nonpoint source regulation.

In fact, the potential for obtaining grants demonstrates that Congress recognized the burdens that the CWA's nonpoint source regulations may impose upon the states that elect to administer the program. However, even with this federal largesse, grants are only a small part of the CWA's nonpoint sources scheme. Grants are only eligible to offset the costs of assessment reports under 33 U.S.C. § 1329(a) and nonpoint source management programs under 33 U.S.C. § 1329(b). 33 U.S.C. § 1329(h)(1). Oklahoma's claim that nonpoint source compliance is merely

a condition for grant money is belied by the fact that these grants are "subject to such terms and conditions as the Administrator considers appropriate . . . ." *Id.* Under Oklahoma's interpretation, Congress needlessly went to great lengths in creating nonpoint source regulations in sections 1313 and 1329 when the EPA can simply substitute whatever terms it feels are "appropriate."

In sum, the CWA's nonpoint source requirements are pre-existing obligations, which may or may not be partially funded by a grant, while the EPA may provide grant funds subject to additional administrative requirements. *See* 68 Fed. Reg. 60,653, 60,667-71 (Oct. 23, 2003) (EPA guidance on additional criteria for grant awards, such as work plans, reporting and record-keeping, and requirement that State fund at least 40% of costs). Contrary to Oklahoma's argument, the CWA's nonpoint source obligations are *not* a mere optional grant-giving scheme.

II. THE CWA'S NONPOINT SOURCE REGULATIONS DISPLACE FEDERAL COMMON LAW

Oklahoma implicitly concedes that its federal common law claim against point sources has been displaced. Resp. at 8. Oklahoma mistakenly continues to assert, however, that a potential federal common law claim against nonpoint sources has not been displaced, despite ample evidence that Congress has "*spoken to* [the] particular issue." *Milwaukee*, 451 U.S. at 313 (emphasis added) (finding that Congress definitively displaced federal common law in the area of interstate point source pollution). The test for displacement of federal common law is significantly more lenient than the preemption test discussed above. A litigant is not required to show comprehensive federal regulation or conflict between federal legislation and federal common law claims. Rather, federal common law is displaced whenever Congress "speaks" about an issue or, in other words, whenever it "addresses the problem formerly governed by federal common law." *Id.* at 315 n.8; *see also Texas v. Pankey*, 441 F.2d 236, 241 (10th Cir.

1971) (federal common law is displaced when "the field has been made the subject of comprehensive legislation or authorized administrative standards….").

Contrary to Oklahoma's assertions, Congress has certainly addressed the issue of water pollution in general and nonpoint source pollution in particular. *See, e.g.*, 33 U.S.C. § 1329 (titled "Nonpoint source management programs"); 68 Fed. Reg. 60,653, 60,654 (Oct. 23, 2003) ("Congress enacted Section 319 of the [CWA] in 1987, establishing a national program to control nonpoint sources of water pollution"); H. Rep. 99-1004 at 141- 145 (1986) (section titled "Management of Nonpoint Sources of Pollution" discussing establishment of "a national policy that plans for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner . . . ."); S. Rep. 99-50 at 33-43 (section titled "Nonpoint Source Pollution" discussing amendments that "require development of implementation programs to control nonpoint source pollution."); H. Rep. 99-189 at 8- (1985) (sections titled "Policy for Control of Nonpoint Sources of Pollution" and "Control of Nonpoint Sources of Pollution" discussing "the national policy that plans for the control of nonpoint source pollution be developed and implemented . . . ."). Under Congress's direction, the EPA has promulgated the requisite administrative standards regulating nonpoint source pollution. *See* 40 C.F.R., Parts 130, 131 (both containing nonpoint source management standards). Accordingly, it is clear that Congress has "spoken to" the problem of nonpoint source pollution, requiring this Court to dismiss count five of the Complaint.

III. OKLAHOMA'S ATTEMPT TO REGULATE BUSINESS CONDUCT OCCURRING IN ARKANSAS VIOLATES THE COMMERCE CLAUSE, DUE PROCESS, AND PRINCIPLES OF STATE SOVEREIGNTY

Oklahoma concedes, as it must, that it seeks to regulate the management and application of poultry litter not only within Oklahoma, but also in Arkansas. *See* Resp. at 5, 19-22. Oklahoma further admits that this lawsuit seeks to supplant Arkansas law (which expressly

authorizes the application of poultry litter as a natural fertilizer)[5] and to instead apply Oklahoma law to activities occurring within Arkansas. *Id.* at 8, 19-22. Thus, Oklahoma asks this Court to issue an injunction prohibiting Arkansas citizens from undertaking actions within Arkansas that are permitted under Arkansas law because those activities are allegedly illegal across the border in Oklahoma. *See, e.g., id.* at 5, 8, 19-22; Complaint ¶ 131-32.[6]

Oklahoma's response claims the Commerce Clause permits this unambiguous attempt to impose the policy choices of the Oklahoma government within the State of Arkansas. As the State of Arkansas explained in a recent petition that it filed with the United States Supreme Court challenging Oklahoma's actions, this argument is contrary to binding Supreme Court precedent.[7]

A. Oklahoma's Action Must Be Dismissed Because It Seeks To Directly Regulate Interstate Commerce

Oklahoma's claim that its decision to apply Oklahoma law within Arkansas must be evaluated under the balancing test articulated in *Pike v. Bruce Church*, 397 U.S. 137 (1970), is misplaced. The Supreme Court has unambiguously held that *Pike* is inapplicable where, as here, a State seeks to *directly* regulate conduct occurring wholly within the borders of another State (*i.e.*, interstate commerce). *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-579. The *Pike* test only examines indirect "*incidental*" effects on interstate

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[5] *See, e.g.*, Ark. Code Ann. §§ 15-20-901, *et seq.*; §§ 15-20-1101, *et seq.*

[6] While Oklahoma admits that most of its claims are intended to have extra-territorial application, *see id.*, Oklahoma states that it will restrict counts 8 and 9 of its Complaint solely to practices allegedly occurring within Oklahoma and not Arkansas. *Id.* at 7-8, n.4.

[7] Arkansas's brief to the Supreme Court has been filed with this Court as an exhibit to Defendants' Motion to Stay Proceedings and Integrated Opening Brief in Support (Docket #125). Arkansas's brief thoroughly analyzes the Commerce Clause, Due Process, and sovereignty issues associated with Oklahoma's attempt to apply its laws to conduct occurring in Arkansas. *See id.* Because Defendants raised these arguments in their original motions to dismiss, Defendants refer the Court to Arkansas's brief for a full discussion of these issues and incorporate and adopt those arguments by reference.

commerce, by evaluating whether otherwise neutral *intra*state regulation nevertheless unnecessarily burdens interstate commerce. *See Pike*, 397 U.S. at 142.[8] But *Pike* has no application where a state seeks to *directly* regulate the practices of out-of-state citizens in their home state; rather, the Supreme Court has held that such regulatory practices are *per se* invalid. *See Brown-Forman*, 476 U.S. at 578-579 (contrasting the *Pike* balancing test with review of State actions imposing extraterritorial regulation). Indeed, such state action directly and unambiguously contradicts the constitutional grant of exclusive authority to the Congress. *See* U.S. Const. art. I, § 8, cl. 3 (The Congress shall have Power … To regulate Commerce … among the several States….").[9]

Accordingly, once the Supreme Court has determined that a state is seeking to impose its laws on conduct occurring within a sister state, the Court has "generally struck down the statute without further inquiry." *Brown-Forman*, 476 U.S. at 579; *see also Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (plurality opinion) ("The Commerce Clause, however, permits only *incidental* regulation of interstate commerce by the States; direct regulation is prohibited"). Thus, Oklahoma's proffered justification for the application of Oklahoma law within Arkansas—

[8] In *Pike*, an Arizona regulation which required an Arizona producer to list the state of origin (Arizona) on cantaloupes shipped out of state violated the dormant Commerce Clause because it burdened interstate commerce by having the effect of requiring the producer to "build and operate an unneeded $200,000 packing plant in [Arizona]." *Pike*, 397 U.S. at 145. Thus, the balancing test was appropriate because the "effects on interstate commerce [we]re only incidental." *Id.* at 142.

[9] Oklahoma obliquely argues that the *per se* test only applies to regulations that are facially discriminatory. Resp. at 25. Such a narrow interpretation of the Commerce Clause has been rejected by the Supreme Court. In fact, there are three circumstances in which a state regulation is *per se* invalid: "When a state statute [1] directly regulates or [2] discriminates against interstate commerce, or [3] when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown & Forman*, 476 U.S. at 579. Thus, Oklahoma's claim that its laws are "even-handed[]" is of no moment. *See* Resp. at 25. It is "direct regulat[ion]" rather than facial discrimination that undermines Oklahoma's action.

that the regulation of Arkansas's businesses may be beneficial to Oklahoma—is immaterial to the constitutional analysis (and is only relevant under the *Pike* test). *See Shafer v. Farmers Grain Co. of Embden*, 268 U.S. 189, 199 (1925) (extraterritorial regulation is "prohibited … and invalid, regardless of the purpose with which it was enacted."); *Edgar*, 457 U.S. at 642-643 ("The Commerce Clause also precludes the application of a state statute…that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."). Extraterritorial regulation of out-of-state commerce is constitutionally impermissible without regard to governmental purpose. *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (States cannot regulate "commerce that takes place wholly outside of the State's borders, *whether or not the commerce has effects within the State*" (emphasis added)). The *only* inquiry this Court must make "is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.*

Here, Oklahoma concedes that it seeks to control conduct beyond the boundaries of the state, by seeking injunctive relief in order to impose its own policy preferences upon Arkansas. *See* Resp. at 5, 19-22. This concession is fatal and requires dismissal of Oklahoma's state law claims.

In all events, Oklahoma's response blithely ignores the fact that application of Oklahoma law in Arkansas will require Defendants to comply with two, plainly inconsistent sets of state laws and regulations. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987). As Defendants explained in their opening brief, Oklahoma's actions have the "practical effect" of "creat[ing] just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Healy*, 491 U.S. at 337. Thus, Oklahoma simply has no answer to the critical question of "how the challenged statute may interact with the legitimate

regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id* at 336

B. Oklahoma Cannot Punish Conduct Lawful In Arkansas

Oklahoma asserts that Defendants' due process argument is nothing more than a test for minimum contacts. *See* Resp. at 2. But in so arguing, Oklahoma overlooks the Supreme Court's fundamental limitation on a state's ability "to punish a defendant for conduct that may have been lawful where it occurred." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003); *see also BMW of North America v. Gore*, 517 U.S. 559, 573 n.19 (1996) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."). Thus, even though Oklahoma may disagree with the policy judgments exercised by the people of Arkansas, Oklahoma has no authority to impose its preferences upon individuals engaged in lawful conduct in Arkansas. *See Virginia v. Bigelow*, 421 U.S. 809, 824 (1975) ("Virginia possessed no authority to regulate the services provided in New York.").

Finally, Oklahoma's argument that Defendants cannot bring a claim premised upon Arkansas's sovereignty, *see* Plf's Resp. at 27 n.20, merely underscores the need for this Court to defer adjudication of this case pending resolution of Arkansas's action against Oklahoma before the Supreme Court. Arkansas unquestionably has the right to bring claims based upon its own sovereignty, and as *parens patriae* for its citizens' interests. Accordingly, the Supreme Court is the most appropriate forum for these constitutional questions to be resolved.

C. Oklahoma Cannot Constitutionally Supplant Arkansas Law By Means Of A Common Law Claim

As a last resort, Oklahoma attempts to excuse its unconstitutional conduct by manufacturing a distinction without constitutional difference. Oklahoma asserts that its attempt to enjoin Arkansas citizens from engaging in conduct which is expressly permitted *in Arkansas* is

not extraterritorial "regulation" to the extent it is imposed by Oklahoma common law rather than positive legislative enactments and regulations. Resp. at 23-24. But the Supreme Court has expressly rejected the argument Oklahoma now makes: "[R]egulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)*; see also BMW v. Gore*, 517 U.S. 559, 572 n.17 ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."). The fact, therefore, that Oklahoma seeks to impose its law within Arkansas through common law is irrelevant. Whether by statute, regulation, or common law, Oklahoma seeks to exert control over Defendants and displace Arkansas law governing the application of poultry litter in Arkansas.

IV. CONCLUSION

For the foregoing reasons counts four, five, six, seven, eight, nine, and ten of the Complaint should be dismissed.

Dated: December 6, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

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